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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARK J. ROGERS and
THOMAS E. BUSH, Petitioners,

v.

MYRON L. GORDON and
ROBERT W. WARREN, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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The petitioners Mark J. Rogers and Thomas E. Bush respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Seventh Circuit entered in this proceeding October 6, 1980.[1]

QUESTIONS PRESENTED

1. Does a circuit court of appeals have jurisdiction to review a determination by a district court pursuant to the Criminal Justice Act, 18 USC 3006A(d)(3), that representation by appointed counsel was not extended or complex, thus denying counsel compensation in excess of $1,000?

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1. PARTIES TO THE PROCEEDINGS IN THE SEVENTH CIRCUIT: Appeal Nos. 79-2160, 79-2161 and 79-2244, UNITED STATES OF AMERICA, plaintiff--appellee, v. JAMES F. SMITH, defendant (appeal of Mark J. Rogers, attorney), appealed from the United States District Court for the Eastern District of Wisconsin, No. 78-CR-157--Myron L. Gordon, Judge, and No. 78-CR-158--Robert W. Warren, Judge. Appeal No. 79-2068, UNITED STATES OF AMERICA, plaintiff--appellee, v. JEAN GRISTEAU, defendant (appeal of: Thomas E. Bush, attorney), appealed from the United States District Court for the Eastern District of Wisconsin, No. 78-CR-161 Robert W. Warren, Judge. The Seventh Circuit consolidated for appeal another case, No. 80-1054, Charles Edward Bunn petitioner, v. Attorney General of the United States, et al., respondents (appeal of Jona Goldschmidt, attorney), which case is not part of this petition for certiorari.

2. Is an appointed attorney's remedy for abuse of discretion by a district judge in failing to certify that his representation was extended or complex under the Criminal Justice Act, 18 USC 3006A(d)(3), limited solely to filing a petition for a writ of mandamus?

3. Is a defendant's Sixth Amendment right to counsel impaired where appointed attorney fee determinations under the Criminal Justice Act, 18 USC 3006A, are made by the district court without consistent standards to guide it, and where a determination by the district court that representation was not extended or complex is not reviewable on appeal?

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals rendered October 6, 1980 appears in the Appendix hereto, and as U.S. v. Smith, 633 F 2d 739 (7th Cir. 1980).

JUDGMENT BELOW

The Seventh Circuit issued its mandate the same date as its opinion, October 6, 1980, dismissing the appeals for lack of jurisdiction. Petitioners timely moved for rehearing and rehearing en banc, which was denied by the Seventh Circuit October 28, 1980. However, on November 7, 1980, the Seventh Circuit, acting sua sponte, vacated its order denying the petition for rehearing and suggestion for rehearing en banc. Respondents--Appellees answered the petition for rehearing, and on December 23, 1980, the petition for rehearing was finally denied.[2]

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2. Copies of the aforementioned Seventh Circuit orders follow the opinion in the Appendix hereto, pp. 66 to 70.

JURISDICTION

The final order denying hearing and rehearing en banc was entered by the Seventh Circuit Court of Appeals on December 23, 1980. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under either 28 USC 1254(1) and 2101(c), or 28 USC 1254(1) and Supreme Court Rule 20.1. The Seventh Circuit dismissed the instant appeal for lack of jurisdiction without addressing whether the appeal was civil or criminal in nature. Petitioners believe that the case below, involving questions of attorneys' fees for appointed counsel in a federal criminal case, is a civil matter, thus implicating this Court's civil certiorari jurisdiction and the 90 day time limit of 28 USC 2101(c). However, petitioners have intentionally complied with

the 60 day time limit for consideration by this Court for writs of certiorari in criminal cases should this matter be considered criminal in nature. See Supreme Court Rule 20.1.

Since the issue in this petition, as in the court of appeals below, is whether there is any federal appellate jurisdiction for determinations by the district court that appointed counsel's representation was not extended or complex, the remainder of this jurisdictional statement is contained in the body of this petition.

STATUTES INVOLVED

Title 18 USC 3006A(d) provides, in relevant part, as follows:

> "(d) Payment for representation.
>
> (1) Hourly rate.--Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment

thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court... . Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts.--For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged... .

(3) Waiving maximum amounts.--Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims.--A separate claim for compensation and reimbursement

shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid."

....

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked under 18 USC 3006A(d)(4), the Criminal Justice Act (hereinafter referred to as "CJA") which is the statute that since 1964 has provided the scheme for payment of appointed attorneys fees in federal criminal cases.[3] The district court determination was appealed to the Seventh Circuit pursuant to 28 USC 1291.

Petitioner Mark J. Rogers, an attorney practicing in Milwaukee, Wisconsin, was appointed by respondent, the Honorable Myron L. Gordon, to represent James F. Smith, a Menominee Indian, charged with a federal felony in case 78-CR-157. On November 9, 1978, respondent, the Honorable Robert W. Warren, appointed petitioner Rogers to represent the same defendant in case 78-CR-158, another pending federal felony case in the Eastern District of Wisconsin.

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3. Criminal Justice Act of 1964, P.L. 88-455, 78 Stat. 552, 18 USC 3006A.

After completion of services in both cases, petitioner Rogers submitted to each trial court a voucher, an itemization of services, an itemization of expenses and a request for attorneys fees in excess of the statutory maximum based on extended or complex representation. On July 26, 1979 Judge Gordon denied the request for compensation in excess of the statutory maximum in case 78-CR-157. On July 30, 1979 Judge Warren denied the request for excess compensation in case 78-CR-158. See Appendix hereto, pages 73, 75. Both Judges Gordon and Warren issued orders clarifying their denial of excess compensation. Appendix pp.71 and 72. Petitioner Rogers timely appealed to the Seventh Circuit from the orders denying him excess compensation in both cases.

Petitioner Thomas E. Bush, an attorney practicing in Milwaukee, Wisconsin, was

appointed to represent Jean Gristeau, a Menominee Indian, regarding a federal felony indictment in the Eastern District of Wisconsin in case 78-CR-161. After completion of services, petitioner Bush submitted to respondent Judge Warren a voucher, an itemization of services and expenses, and a request for attorneys fees in excess of the statutory maximum. By letter dated July 24, 1979, respondent Judge Warren denied petitioner Bush's application for excess fees. Appendix p.74. Petitioner Bush timely appealed this decision to the Seventh Circuit.[4]

4. This petition will not detail the facts and circumstances under which it was asserted below that the district courts were in error in denying certification of both petitioners' representation as extended or complex for purposes of providing attorneys fees in excess of the statutory maximum. 18 USC 3006A(d)(3), (4). Both respondent Judges praised the quantity and quality of the work performed by petitioners, which included a substantial challenge to the grand jury array in the Eastern District of Wisconsin based on exclusion of Indians, (Footnote continued on next page.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, HOLDING THAT DENIAL OF EXCESS COMPENSATION UNDER THE CJA IS NOT APPEALABLE, IS IN CONFLICT WITH DECISIONS OF THE FOURTH, EIGHTH AND NINTH CIRCUITS ON THE SAME ISSUE AND WITH THE PRINCIPLES OF THIS COURT ON SIMILAR ISSUES.

The holding in the case below is:

> "Because we conclude that a determination by a district court disallowing fees in excess of the maximum limit under the CJA is not a reviewable order, there is no jurisdiction to entertain these appeals. Therefore, the appeals are dismissed." Appendix p. 65.

FOOTNOTE FROM PRECEDING PAGE CONTINUED.
and which involved two full days of in-court evidentiary hearings; defense counsel review of 1500 jury questionnaires; and the use of three expert witnesses. Petitioner Bush represented his client through complex pretrial motions regarding jurisdiction over Indian offenses and through a three-day jury trial in which his client was acquitted of the major charge but found guilty of another. Bush was subsequently appointed to pursue the Gristeau appeal in the Seventh Circuit, where his efforts in the same case in that court were certified as extended and complex, and he was allowed fees twice the statutory maximum.

The Fourth and Eighth Circuit Courts of Appeal have ruled sub silentio that district court denial of excess fees is appealable by addressing the merits of counsel's complaints concerning the district court's rulings. United States v. Turner, 584 F 2d 1389 (8th Cir. 1978); United States v. Ketchem, 420 F 2d 901,904 (4th Cir. 1969). The Turner case was an appeal identical to the case below. The court assumed jurisdiction and held:

> "The sole issue in this appeal is whether the district court abused its discretion by limiting the fee of counsel appointed to represent a defendant in a criminal case pursuant to the CJA to $250. The trial lasted approximately one-half day. We find no abuse of discretion." 584 F2d at 1389.

The Ketchem court overruled the district court and ordered reimbursement under the CJA for certain counsel expenses in the context of an appeal dealing with other substantive issues raised by the criminal

defendant on appeal. 420 F 2d at 904. Under similar circumstances, the Fifth Circuit has refused to hear attorney appeals from denial of excess compensation under the CJA in the same proceeding as the substantive criminal appeal, but has reserved the question of whether such determinations are appealable. U.S. v. Todd, 475 F 2d 757, 579 N. 3 (5th Cir. 1973); U.S. v. Sullivan, 456 F 2d 1273, 1275 (5th Cir. 1972).

The Ninth Circuit has heard and reviewed a CJA fee determination on appeal from an action brought by an attorney against the United States under 28 USC 1346(a)(2), the general statute conferring federal jurisdiction for claims against the United States. Botts v. U.S., 413 F 2d 41 (9th Cir. 1969). Comfortable with this procedural posture, the Ninth Circuit in Botts proceeded to examine the merits of the fee controversy under the CJA, including the adequacy of counsel's

voucher, the appropriateness of summary judgment, and the possibility of disqualification of the trial judge hearing the case. 413 F 2d at 43-45.[5]

Commentators on the CJA have uniformly assumed that jurisdiction would exist in the court of appeals to review fee determinations in the district court for abuse of discretion. Note, Adequate Representation for Defendants in Federal Criminal Cases: Appointment of Counsel Under the Criminal Justice Act of 1964, 41 NYU L. Rev. 758, 789 (Oct. 1966); Annot: Compensation, Under Subsection (d) of Criminal Justice Act of 1964 [18 USC 3006A(d)], of Counsel Appointed for Accused, 9 ALR Fed. 569. The writers

5. On the other hand, in Camenish v. U.S., 553 F 2d 1271 (DC Cir. 1976) a class action was brought on behalf of D.C. lawyers claiming arbitrary reductions of CJA fees. Dismissal for failure to state a claim was affirmed and the use of 28 USC 1346(a)(2) to establish jurisdiction was rejected, over vigorous dissents. See 553 F 2d at 1276.

of the NYU Law Review Note state the proposition as follows:

> "While discretionary decisions will be reversed by appellate courts only when there is an abuse of discretion, there is authority that discretionary decisions on compensation can be reviewed." 41 NYU L. Rev. at 789.

There is nothing in the legislative history of the CJA or in cases interpreting it to date, other than the case below, which would lead to the conclusion that denial of excess compensation under the CJA by the district court is not appealable. In addition to the cases previously cited, there are numerous court of appeals cases dealing with issues under the CJA where appellate jurisdiction for such determinations is assumed, including the Seventh Circuit. U. S. v. Reddick, 620 F 2d 606 (7th Cir. 1980)(denial of appointment of expert affirmed); See also, U.S. v. Sims, 617 F 2d 1371, 1375 (9th Cir. 1980)[standards for appointment

of experts under CJA §3006A(e)(1)];U.S. v. Rogalsky,575 F 2d 457, 459 (3rd Cir. 1978) (regarding applicability of CJA §3006A(e)(1) to payment for expert psychiatric fees, held that order assessing Department of Justice with psychiatrist's bills is appealable); U.S. v. Crim,527 F 2d 289, 296 (10th Cir. 1975) cert. den. 96 S. Ct. 1497 (1976) (appeals court reviewed fee determination to expert pursuant to CJA §3006A(e)).

In all similar proceedings where a statutory scheme allows for the payment of certain fees related to litigation, appeal of the district court's determination of those fees has been allowed. The compensation order for a master who was appointed under former Equity Rule 68 which expressly left compensation to the trial court's discretion was found appealable, and indeed reversed, by this Court in Newton v. Consolidated Gas Co., 259 US 101, 104-105

(1922). This Court, after citing the Equity Rule providing that the compensation to be allowed a master "shall be fixed by the district court, in its discretion" went on to set standards for exercise of that discretion and further stated:

> Having regard to these general principles and the special value of knowledge possessed by the trial court, much weight must be given to its opinion. Ordinarily we may not substitute our judgment for its deliberate conclusions, nor interfere with the exercise of its discretion. But when that court falls into error which amounts to abuse of discretion, and the cause comes here by proper proceedings, appropriate relief must be granted. 259 US at 105.

See also, Coskery v. Roberts and Mander Corp., 200 F 2d 150 (3rd Cir. 1952)(holding that district court compensation of receivers was subject to review for abuse of discretion); Official Creditors of Fox Markets v. Ely, 337 F 2d 461, 466 (9th Cir. 1964) (fee award to bankruptcy counsel overturned

on abuse of discretion); York Int'l. Bldg. v. Chaney, 527 F 2d 1061, 1068 (9th Cir. 1975)(same).

It is impossible to reconcile the Turner, Ketchem, and Botts cases, supra, with the case below. It is further impossible to reconcile the case below with the cases, including Seventh Circuit cases, cited herein where courts of appeals routinely review compensation for experts under CJA §3006A(e); compensation of court appointed masters; compensation of bankruptcy trustees and attorneys; and disputes over whether fees should be paid under the CJA or by the defendant.[6]

In addition, numerous statutes and judicially developed doctrines allow for

6. In U.S. v. Durka, 490 F 2d 478 (7th Cir. 1973) the Seventh Circuit reviewed and affirmed a district court order directing the defendant to pay his appointed counsel's attorneys fees.

recovery of attorneys fees at the conclusion of a case. The right of appellate review pursuant to 28 USC 1291 on the issue of recovery of attorneys fees is so well settled that the question of appealability is never even raised except in the context of whether the decision regarding fees is final. The standard for review is abuse of discretion by the lower court in awarding attorneys fees or in fixing the amount. Alyeska Pipeline Service Company v. Wilderness Society, 421 US 240, 241 (1975); Swanson v. American Consumer Industries, Inc., 517 F 2d 555 (7th Cir. 1975); Hairston v. R & R Apartments, 510 F 2d 1090 (7th Cir. 1975). In Swanson, supra, attorneys fees were sought by plaintiff's counsel on the common fund theory after judgment had been rendered in the case. Appealing on their own behalf, the attorneys sought more than the district

court would grant. 517 F 2d at 559. The court noted that the attorneys fee issue was principally a matter between attorney and client, with the opposing party in the main litigation being only tangentially involved. Id. at 560. The appealability of the subject matter itself was never questioned in the case, despite the fact that the appeals, like those here, were by the attorneys themselves, flowed from applications made after judgment was rendered, and involved a defendant who was only tangentially involved in the dispute.

Similarly, in Hairston, supra, following the well-settled doctrine of appealability under 28 USC 1291 of the denial of attorneys fees governed by statute, the Seventh Circuit entertained the merits of such an appeal even in circumstances where, as here, the award was to go directly to counsel. 510 F 2d at 1093.

The court below found support for its holding in what it termed the "non-adversarial nature of the proceedings for filing compensation claims." Appendix p. 63. The court below outlined the procedure involved, namely, submission of voucher by letter at the close of court proceedings, where the United States is not notified of the compensation request, the request is not docketed, and, in most circumstances, no hearing is required. Appendix, p. 64. The court below concludes: "In sum, in district court proceedings the fee award involves only the appointed counsel and the district judge."[6.5]

This reasoning in no way supports denial of appealability of the fee determination. Under the CJA itself, there is appellate

6.5 Appendix, p.64; but cf., U.S. v. James, 301 F Supp. 107 (DC Tex. 1969). Apparently whenever there is the slightest fee controversy in Texas, the United States is invited to participate. A form has been developed for this purpose which is reprinted in Annot:, supra, 9 ALR Fed. at p. 577.

jurisdiction to review at least two different types of determinations under similar so-called "non-adversarial" circumstances; that is, where the United States is not ordinarily notified of the determination, no hearing is usually required, and the rights being adjudicated are clearly ancillary to the substantive criminal proceeding. These two instances of assumed appellate jurisdistion are in the area of appointment of particular counsel under CJA §3006A(b), and the determination of indigency for purposes of eligibility for appointment of counsel under CJA §3006A(b). See e.g., Roberts v. U.S. District Court for the Northern District of California, 339 US 844 (1950) (denial by a district judge of a motion to proceed in forma pauperis is an appealable order under 28 USC 1291); U.S. v. Davis, 604 F 2d 474 (7th Cir. 1979)(no right to appointment of specific attorney under CJA); U.S. v.

Deutsch, 599 F 2d 46 (5th Cir. 1979)(question of indigency examined on appeal). Petitioners suggest that the Seventh Circuit has arbitrarily denied an appeal remedy for the particular situation where the district court refuses to certify representation as extended or complex, and denies excess compensation, under a statutory scheme which has been held to confer a right of appeal for virtually every other determination made under it.[7]

In summary, there is direct conflict among the Circuits as to the appealability of a district court's denial of excess compensation under the CJA. Every other determination under the CJA can be reviewed on appeal, notwithstanding the "non-adversarial"

7. The structure of how other attorney fee determinations are reviewed under the CJA is discussed beginning ante, at page 34.

nature of the district court's determinations (indigency, appointment of counsel, appointment of experts, computation of hourly rates[8]). This Court and the Courts of Appeals have often times reviewed the award of attorneys fees on appeal under other statutory schemes, and there is nothing in the legislative history of the CJA that would prevent such a review on appeal in this case.[9]

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8. U.S. v. Thompson, 361 F Supp. 879 (DC 1973), aff'd. in part without op. and vacated in part without op. 489 F 2d 1973.

9. The court below admits this, stating:
"There is no provision in the act for review of awards made within the specified limits. Similarly, the legislative history is silent on whether any review was intended." Appendix p.61.

II. THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO CLARIFY PROCEDURE AND PRACTICE FOR FEE DETERMINATIONS UNDER THE CJA.

A. PROCEDURE AND PRACTICE IN THE COURTS BELOW IN MAKING FEE DETERMINATIONS UNDER THE CJA IS VARIED AND CHAOTIC, REQUIRING THIS COURT'S GUIDANCE.

This Court has looked at the CJA only once, holding that an attorney appointed under the CJA is not entitled to immunity from a malpractice action brought by his former client. Ferri v. Ackerman, 444 US 194, 62 L. Ed. 2d 355 (1979). The Ferri opinion clearly puts the burden on appointed counsel to perform competently. This Court, does, however, recognize the problem of assuring that competent counsel will remain willing to accept the work of representing indigent

defendants where their monetary compensation is significantly less than that of retained counsel. 62 L. Ed. 2d at 364. Petitioners respectfully suggest that granting certiorari in this case and reversing the court of appeals would help to insure that competent counsel would remain willing to accept the work of representing indigent defendants because there would be an avenue of appeal for wrongful denial of compensation in excess of the ridiculously low maximum statutory amounts. Petitioners are not seeking to overturn the hourly rates and maximums set by Congress. Petitioners seek the ability to have review by appeal of the district court's denial of their claims for excess compensation which were submitted in compliance with the statutorily defined rates.

This Court further has the opportunity to clarify the varied and chaotic way in

which fees are determined and reviewed under the CJA in the various courts of appeals and district courts.

We start with the statutory procedure about which there is no conflict, namely what happens when the district court certifies representation as extended or complex, and grants excess compensation. The grant of excess compensation is automatically reviewed by the chief judge of the circuit. 18 USC 3006A(d)(3). The chief judge of the circuit, sitting alone, may approve or disapprove the excess compensation. If he disapproves or reduces the excess compensation, in the Seventh Circuit the only means of review of that decision has been held to be a mandamus action in this Court. U.S. v. D'Andrea, 612 F 2d 1386, 1388 (7th Cir. 1980). By contrast, in at least one case in the DC Circuit, a full appeals panel affirmed in

part and reversed in part a determination by the chief justice of the circuit reducing excess fees awarded by the district court. U.S. v. Thompson, 361 F Supp. 879 (DCDC 1973) aff'd. in part and vacated in part without opinion as U.S. v. Boggins 489 F 2d 1973 (DC Cir. 1974).[10]

While CJA §3006A(d)(3) only provides for chief judge review where excess compensation is granted, in the Third Circuit the chief judge has reviewed cases where, as in the instant case, excess compensation was denied by the district court. U.S. v. Kingston, 256 F Supp. 859 (DC WD Pa 1966). Thus, this Court is faced with a situation where lower

10. In the DC Circuit and the Third Circuit, chief judges of those circuits routinely write opinions approving or disapproving the grant of excess compensation under CJA 3006A(d)(3). For some reason, these opinions are published in the Federal Supplement rather than the Federal Reporter. See e.g., U.S. v. Owens 256 F Supp. 861 (WD PA 1966) U.S. v. Hunter 394 F Supp. 997 (DCDC 1975); U.S. v. Harper 311 F Supp. 1072 (DCDC 1970). These opinions generally articulate standards as to what constitutes extended or complex representation.

courts have treated the issue in this case (that is, review of denial of excess compensation by the district judge under the CJA) in three distinctly different ways: the Seventh Circuit, in the case below, has held that no appeal may follow such a denial; the chief judge of the Third Circuit, sitting alone, has reviewed such a denial (Kingston, supra); and the Fourth, Eighth, and Ninth Circuits have considered full appeals from such denials (Ketchem, Turner and Botts, supra). Clearly, the time has come for this Court to step in and set down the proper procedure to be followed.

Lastly, even more divergent procedures are followed if the appointed representation is for an appeal. In the Seventh Circuit, the compensation request is addressed to the circuit judge who wrote the opinion. If counsel is dissatisfied with the compensation certified he may petition for rehearing by

a full panel or an en banc panel of circuit judges. U.S. v. D'Andrea, supra, at 1387. The Ninth Circuit has appointed a master to determine appointed attorneys fees for an appeal, whose report is heard by a full circuit panel. U.S. v. Nakamura, 577 F 2d 485 (9th Cir. 1978). In the DC Circuit, the chief judge of the Circuit reviews such fee claims alone, just as is done for approvals of excess compensation awarded by the district court. U.S. v. Bailey, 581 F 2d 984 (DC Cir. 1978).

The variety of procedures used by the courts below in making and reviewing CJA fee determinations illustrates the necessity for this Court to exercise its supervisory powers to settle uncertainty and provide uniformity in this area of the law.

B. MANDAMUS AS THE SOLE REMEDY FOR REVIEW OF DENIAL OF EXCESS COMPENSATION UNDER THE CJA IS INAPPROPRIATE.

The opinion below, read together with the Seventh Circuit's opinion in D'Andrea, supra, indicates that if there is any remedy at all for review of a district court's denial of excess compensation, it is in a mandamus action in this Court, or, presumably, in the court of appeals. Appendix p.63; 612 F 2d at 1388.

In a case involving an order allowing attorneys fees, this Court rejected mandamus as the appropriate avenue of review. Ex Parte Fahey, 332 US 258, 91 L. Ed. 2041 (1946). The issue in Fahey was whether this Court would review a district court order allowing counsel for plaintiffs $50,000 as attorneys fees for services in the case below. This

Court denied application for leave to file a petition for writ of mandamus, stating:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to retain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals." 332 US at 260.

This Court went on to hold that the attorneys fees question was one to be pursued by appeal "at the proper time and to the appropriate court." Id., at 260; See also, Roberts v. U.S. District Court for the Northern District of California, supra.

Mandamus has traditionally been an appropriate remedy for correcting or com-

pelling the performance of ministerial acts or duties only, as "when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory." 7 Moore's Federal Practice ¶81.07, pp. 81-94; Miguel v. McCarl, 291 US 442 (1934). The writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Will v. U.S., 389 US 90, 95 (1967). And where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory, "mandamus is not the appropriate remedy." U.S. ex rel. Girard Trust Co. v. Helvering, 301 US 540, 543 (1937). While the provisions of the CJA

speak in terms of mandatory obligations upon the district judge ("the court shall fix the compensation and reimbursement to be paid to the attorney...") the district court's determination of whether or not to allow excess compensation is clearly discretionary. CJA §3006A(d)(3), (4). The language in §3006A(d)(3) is "payment in excess of any maximum amount...may be made for extended or complex representation..." This is the classic statutory language conferring a discretionary duty. The district courts below, in refusing to certify petitioners' representation as extended or complex, and in denying compensation to petitioners in excess of $1,000, have made discretionary rulings which are not properly reviewable by mandamus under the foregoing principles.

It is possible that the court below meant to forbid the use of even a prerogative writ for review of excess compensation denials under the CJA. Petitioners could find no statutory provision or case in any field of law giving exclusive and non-reviewable discretion to the district court to determine any right or entitlement of the litigants or their attorneys.

If the opinion below stands, and mandamus is the only remedy available for review of denials of excess compensation, the mandamus action will usurp the function of an appeal. The function of an appeal is to review the decisions of a district court for error or abuse of discretion. Petitioners should not be forced to seek an extraordinary remedy to have the court of appeals review a discretionary decision under the ordinary appeal standard.

The court below was apparently worried that allowing appeals in cases such as this would be the catalyst to attract attorneys "who look upon the Criminal Justice Act as a profit center." Appendix, p.65. The simple fact is that appeals will not be pursued except in extraordinary cases since neither time nor expenses involved in the attorney's own appeal are compensable under the CJA,[11] and since the amounts in controversy are seldom greater than $1,000.[12] Petitioners do not disagree with the statement in the opinion below describing federal criminal representation of indigents as in part pro bono service. Appendix pp. 64, 73. Petitioners simply suggest that they are

11. U.S. v. James, 301 F Supp. 107 (DC Tex. 1969).

12. In this case, petitioner Rogers seeks approximately $2,600 in excess compensation, and petitioner Bush seeks $2,000 in excess compensation.

entitled to appellate review of their excess compensation claims, which were submitted within the framework of the CJA and at the current CJA hourly rates. In a district such as the Eastern District of Wisconsin, where there is no federal public defender, petitioners suggest it would behoove this Court not to add additional constraints on appointed counsel, in the form of unreviewability on appeal of denied excess fee claims, in order to "make sure that competent counsel remain willing to accept the work of representing indigent defendants." Ferri v. Ackerman, supra, 62 L. Ed. 2d at 364.

In summary, this Court should grant this writ of certiorari to establish uniform procedure in the lower courts for dealing with review of denied excess fee claims, and to correct the improper suggestion by the court below that mandamus is the only

avenue for review of the discretionary act of a district judge in denying an excess fee claim.

III. THIS COURT SHOULD GRANT THE WRIT TO SETTLE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, THAT IS, WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL IS IMPAIRED WHERE INCONSISTENT STANDARDS APPLY TO ATTORNEY FEE DETERMINATION UNDER THE CJA AND WHERE THERE IS NO REVIEW BY APPEAL OF DENIALS OF EXCESS COMPENSATION UNDER THE CJA.

In considering whether the denial of an appeal remedy in the case below has constitutional implications, we start from this Court's statement of the congressional purpose behind the CJA:

> "In response to evidence that unpaid appointed counsel were sometimes less

> diligent or less thorough than retained counsel, Congress concluded that reasonable compensation would improve the quality of the representation of indigents." Ferri v. Ackerman, supra, 62 L. Ed. 2d at 360.

If unpaid counsel are found to be less diligent or less thorough than retained counsel, then surely grossly underpaid counsel will suffer the same malady. In the context of holding that attorneys appointed under the CJA are subject to malpractice actions, this Court worried out loud that there might be a dearth of competent lawyers available for the "important work" of defending indigents. Id., at 364. It is now likely that indigent defendants are being deprived of effective and competent counsel, in violation of their rights under the Sixth Amendment, given the admittedly low rates provided by the CJA, now that appointed counsel are subject to malpractice liability, and now that denials of excess compensation under the CJA cannot be appealed.

Furthermore, the CJA has been administered by the lower courts in a manner which both severely limits the number of cases in which excess compensation is awarded, and now prohibits review by appeal of the compensation thus limited. For example, a congressional subcommittee heard testimony that of nearly 22,000 private appointments in 1978, excess compensation under the CJA was granted in only 313 felony cases and about 60 others.[13] The hourly rates under the CJA have not been raised since 1970, despite a rise in the consummer price index in that time of over 100 percent.[14]

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13. Testimony of Honorable Robert E. Maxwell, hearings before Subcommittee of the Committee on Appropriations, House of Representatives; Subcommittee on the Departments of State, Justice and Commerce, the Judiciary and related agencies, part 1, p. 254 (1978).

14. Amendment to CJA dated October 14, 1970, Pl. 91-447, §1, 84 Stat. 961; figures from Consummer Price Index, 1970-March 1980.

The gross undercompensation outlined above, coupled with the refusal by the court below to hear an appeal of a denial of excess fees, will have the predictable consequence of leaving representation of indigent defendants to the least successful and experienced lawyers. Such a result is a problem of constitutional dimension, as best stated in U.S. v. Bailey, supra, 581 F 2d at 989, as follows:

> "The Sixth Amendment, of course, guarantees to indigents accused in a federal criminal prosecution not just the 'mere formal appointment' of someone who happens to be a lawyer but more critically legal assistance that is reasonably diligent, conscientious, and competent. Clearly, then courts are to interpret the Act 'to assure competent representation of indigent defendants' and that objective is disserved by a narrow miserly construction provision. Only if the practicing bar is encouraged to participate broadly and enthusiastically in the defense of indigent criminal defendants can the promise of the Act ever become reality." (Footnotes omitted).

The Bailey court went on decry the "unfortunate vagueness in the excess compensation standard." Id., at 989.

At the very least, this Court in reversing the court below, could enunciate a standard such as is already the practice in the Northern District of Illinois. In U.S. v. Quintero-Medina, 489 F Supp. 82 (ND Ill. 1980), the court stated in reference to authorizing compensation in excess of $1,000 under the CJA to appointed counsel:

> "Lawyers who devote their substantial talents to the defense of indigent persons accused of crime are entitled to equal treatment. Unfortunately the Congress has placed and retained an unreasonably low limit on the rate at which these lawyers may be compensated from public funds. But certainly all of their time should be compensated at those low rates, when close scrutiny of that time reveals it was reasonably and necessarily spent on the defense of the assigned, indigent defendant. To do less would be to relegate those who defend persons accused of crime to a second-class status and to fail in our statutorily implemented Sixth

> Amendment committment to the indigent accused that they will receive professional representation of a quality comparable to that available to those who are able to retain experienced, able counsel." 489 F Supp. at 85.

Enunciating such a standard, that lawyers appointed under the CJA would be compensated at the statutory rates for all time "reasonably and necessarily spent on the defense" of the indigent defendant would go a long way toward establishing uniform guideposts for administering the CJA to the courts below, and would help ameliorate Sixth Amendment concerns by reducing the disparity in fees obtained between retained and appointed counsel.

The undercompensation problem has a second constitutional dimension which is also exacerbated by the holding below that a district court's denial of excess compensation under the CJA is unreviewable on

appeal. The problem was best stated this way:

> "...in the debate over public defender systems, one of the most significant criticisms of the public defenders has been that, especially where appointed by the bench, they would respond to the desires of the court rather than to the interests of the defendant; a similar deference to the court could result from wide judicial discretion under the CJA to disallow time spent on a case." Note: Criminal Justice Act, supra, 41 NYU L. Rev. at 789.

This deference to the court would be especially noticeable in a small district, such as the Eastern District of Wisconsin, where appointed counsel regularly appear before the same judges, and where counsel know that before certain judges under no circumstances will they receive compensation in excess of the statutory limits, and where, as held by the court below, there is no right to appeal the denial of excess compensation. The Sixth Amendment right to effective, competent

counsel is violated where counsel shows any deference to the court for his own remunerative interests to the detriment of his conduct of a vigorous defense.

Dallin Oaks, the author of the original study on all aspects of CJA administration, argues that availability of compensation that is too low can even lower the quality of representation, "since it may relieve better lawyers from their feeling of obligation to accept appointments. This would leave CJA representation in the hands of less experienced and less able lawyers for whom the low statutory rates (and opportunities for experience) are compensatory." Oaks, Improving the Criminal Justice Act, 55 ABA Journal 217, 220 (March, 1969).[15]

15. See also, Oaks, The Criminal Justice Act in the Federal District Courts, a study published by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st Sess. (1969); and Mulligan, Court Appointed Defense Lawyers Unshielded from Malpractice Suits, 3 National Law Journal No. 21, p. 25 (February 2, 1981): (Footnote continued on next page.)

This Court should grant the writ of certiorari and, in reversing the court below, address the Sixth Amendment implications of improper and inconsistent administration of attorney compensation under the CJA. This Court should adopt the Quintero-Medina standard for grant of excess compensation, and should express its concern with the impairment of an indigent accused's right to counsel where his attorneys are systematically undercompensated.

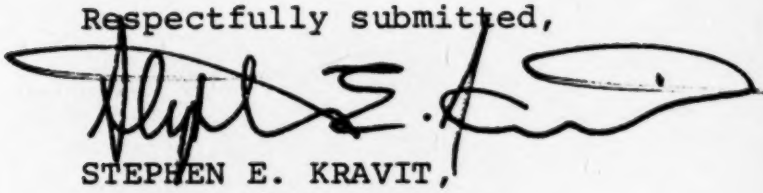
FOOTNOTE FROM PRECEDING PAGE CONTINUED:

> "Clearly, indigency should not be a factor in the scheme of criminal justice. To the extent that the Criminal Justice Act was an attempt to achieve that goal, it is a laudable and important law; but its effectiveness in achieving that goal may be seriously eroded if able trial counsel conclude that appointments are too severe an imposition upon their time with too little remuneration."

CONCLUSION

There is direct conflict between the holding in the case below and the holdings in at least three other circuit courts of appeals. Fee determinations under the CJA have been made by the lower courts in an inconsistent and non-uniform manner. The mandamus remedy suggested by the court below is an entirely inappropriate vehicle for court of appeals review of the denial of excess compensation. The gross undercompensation of appointed counsel under the CJA, exacerbated by the holding of the court below that denials of excess fee determinations are not appealable, has serious Sixth Amendment implications. For the foregoing reasons, this court should grant the writ of certiorari and reverse the holding of the court below.

Respectfully submitted,



STEPHEN E. KRAVIT,
Cooperating attorney,
Wisconsin Civil Liberties
Union Foundation
Attorney for petitioners

Of Counsel: Godfrey & Kahn, S.C.
780 North Water Street
Milwaukee, WI 53202
414/273-3500

DATED: February 20, 1981

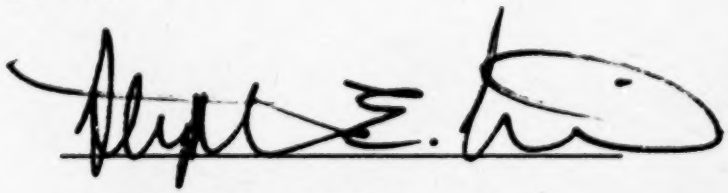
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 1981, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three true and correct copies in each of three sealed envelopes, with postage thereon fully prepaid, in the United States mail at Milwaukee, Wisconsin, addressed as follows:

Jerold S. Solovy, Jenner & Block, One IBM Plaza, 44th Floor, Chicago, Illinois 60611.

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED ON February 20, 1981 in Milwaukee, Wisconsin.



STEPHEN E. KRAVIT

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 79-2160, 79-2161 and 79-2244

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES F. SMITH,

Defendant.

Appeal of: MARK J. ROGERS, Attorney

Appeals from the United States District Court for the
Eastern District of Wisconsin.
No. 78-Cr-157—Myron L. Gordon, *Judge*
No. 78-Cr-158—Robert W. Warren, *Judge.*

No. 79-2068

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEAN GRISTEAU,

Defendant.

Appeal of: THOMAS E. BUSH, Attorney

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 78-CR-161—Robert W. Warren, *Judge.*

(Caption continued on following page)

No. 80-1054

CHARLES EDWARD BUNN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Respondents.

Appeal of: JONA GOLDSCHMIDT, Attorney

Appeal from the United States District Court for the Southern District of Illinois.
No. 75-3064—James L. Foreman, *Chief Judge.*

ARGUED JUNE 10, 1980—DECIDED OCTOBER 6, 1980

Before CUMMINGS and BAUER, *Circuit Judges,* and CROWLEY, *District Judge.**

CROWLEY, *District Judge.* Three court-appointed counsel appeal from determinations of the district courts' disallowing compensation in excess of the maximum amount fixed by the Criminal Justice Act, 18 U.S.C. § 3006A(d)(2). In each of the cases, the district court refused to certify that the representation was "extended or complex" and that excess fees were "necessary to provide fair compensation." 18 U.S.C. § 3006A(d)(3).

The issue is whether those determinations are orders reviewable in this Court. For the reasons set forth below, we conclude that they are not.

Mark Rogers was appointed to represent James Farrell Smith in two felony cases pending before different judges in the Eastern District of Wisconsin.

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* The Honorable John Powers Crowley, Northern District of Illinois, sitting by designation.

Rogers requested compensation of $3,901.16 in one case and $2,263.00 in the other. Each judge approved $1,000 plus expenses.

Thomas Bush, appointed to represent Jean Gristeau in a felony case in the Eastern District of Wisconsin, sought fees of $3,050.67. The district judge authorized $1,000.00 compensation plus expenses.

The third appeal arises from representation rendered on behalf of Charles Edward Bunn, a petitioner seeking a writ of habeas corpus in the Southern District of Illinois. Jona Goldschmidt, his court-appointed counsel, requested compensation of $1,444.00. The district judge approved payment of $250.00.

The Criminal Justice Act, 18 U.S.C. § 3006A, authorizes compensation for services rendered and expenses incurred by court-appointed counsel. The Act places ceilings on the amount of compensation that can be awarded. For representation in felony cases the statutory maximum is $1,000.00; for representation in other kinds of ancillary proceedings, including habeas corpus, $250.00 is the limit. 18 U.S.C. § 3006A(d)(2).

The statute also contains a provision for fee authorizations in excess of those ceilings. However, that provision only applies when the representation is "extended or complex" and the court in which the representation is rendered "certifies that the amount of the excess payment is necessary to provide fair compensation." 18 U.S.C. § 3006A(d)(3). In addition, excess payments must be approved by the chief judge of the circuit. 18 U.S.C. § 3006A(d)(3).

There is no provision in the Act for review of awards made within the specified limits. Similarly, the legislative history is silent on whether any review was intended.[1]

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[1] Appellants argue that two circuits have tacitly recognized the appealability of fee determinations. *United States v. Turner*, 584 F. 2d 1389 (8th Cir. 1978) (court found no abuse of discretion with no discussion of appeal rights); *United*

(Footnote continued on following page)

Nevertheless, the tone of the provisions fixing the limits are mandatory and the provisions governing the filing of claims vest the function of awarding compensation in the court in which representation was rendered. Thus, when counsel is appointed to prosecute an appeal, a judge in the court of appeals determines an appropriate award. When representation is provided in the district court, the judge presiding over the proceeding fixes the fees. And when representation is rendered solely before the magistrate, the magistrate makes the determination. 18 U.S.C. § 3006A(d)(4). *See also* H.R. REP. NO. 91-1546, 91st Cong. 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3982, 3991.

This statutory scheme clearly requires that appropriate awards of compensation are left to the discretion of the court which has had the opportunity to view the proceedings first hand. Moreover, although some compensation must be awarded appointed counsel under the Criminal Justice Act, *United States ex rel. Bibbs v. Twomey*, 538 F. 2d 151, 154 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977), the district judge is accorded "exclusive discretion" in fixing the amount. *United States v. Durka*, 490 F. 2d 478, 480 (7th Cir. 1973).

In *United States v. D'Andrea*, 612 F. 2d 1386 (7th Cir. 1980), we held that when a circuit judge acting for the Court, certified compensation in less than the amount requested, a panel could review the claimed compensation in a petition for rehearing. Although not indicated in the opinion, that result is clearly consistent with the purposes of the Criminal Justice Act, because the three judges before whom the service was rendered would be

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[1] *continued*

States v. Ketchem, 420 F. 2d 901 (4th Cir. 1969) (sua sponte order of reimbursement of expenses with no analysis of jurisdiction). However, we explicitly reserved the question, *United States v. D'Andrea*, 612 F. 2d 1386 (7th Cir. 1980), and at least one other circuit has questioned appellate jurisdiction to review fee determinations. *United States v. Todd*, 475 F. 2d 757, 759 n. 3 (5th Cir. 1973), *United States v. Sullivan*, 456 F. 2d 1273, 1275 (5th Cir. 1972).

jointly reviewing the action taken by a single judge. However, we also held that when the chief judge approved compensation for less than the amount certified by the court in which representation was rendered, no review was available in this Court. The attorney's remedies were limited to a motion for reconsideration addressed to the chief judge and, by dicta, to mandamus in the United States Supreme Court.

D'Andrea was premised on this Court's view of the function assigned to each body in the claims procedure of the Criminal Justice Act. Thus, requests for review of awards for each step in the procedure were found to be properly addressed to the court in which the ultimate determination was made.

The Act requires counsel to submit information relevant to services rendered and expenses incurred to the district court. 18 U.S.C. § 3006A(d)(4). Only when a fee award exceeds the statutory maximum is the chief judge of the circuit required to approve it. It is, then, the district court which makes the ultimate decision as to the appropriate amount of compensation made within the maximum limit, and any review of the award is confined to that court.

Our conclusion is buttressed by the non-adversarial nature of the proceedings for filing compensation claims.[2] *See Brooks v. Laws*, 208 F. 2d 18 (D.C. Cir. 1953). Normally, as was done here, the attorney presents

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[2] Significantly, this case is not one in which a defendant's constitutional rights are implicated in an *ex parte* decision of the district court, *Johnson v. United States*, 352 U.S. 565 (1957); *Roberts v. United States District Court for the Northern District of California*, 339 U.S. 844 (1950); *United States v. Deutsch*, 599 F. 2d 46 (5th Cir.), *cert. denied*, ___ U.S. ___, 100 S. Ct. 283 (1979); *United States v. Durka*, 490 F. 2d 478 (7th Cir. 1973); nor is it one in which the United States, as a party in a criminal action, objects to the payment of costs, *United States v. Rogalsky*, 575 F. 2d 457 (3d Cir. 1978), or becomes involved in a dispute with a third party. *United States v. Plechner*, 577 F. 2d 596 (9th Cir. 1978); *United States v. Fields*, 425 F. 2d 883 (3d Cir. 1970).

his request to the district court in the form of a letter accompanied by a voucher or other sworn written statement enumerating the services rendered, time spent, expenses incurred and payments received from any other source. The compensation request is usually made at the close of the court proceedings when the client's rights have been adjudicated.

None of the indicia accompanying an adversary proceeding exist. The United States is not notified of the compensation request, the request is not docketed, nor, in most circumstances, is a hearing required. *See Application of L.B. & W. 4217*, 238 F. 2d 163, 165 (9th Cir. 1956); *In re Jacobi*, 217 F. 2d 668, 669 (D.C. Cir. 1954). In sum, in district court proceedings the fee award involves only the appointed counsel and the district judge.

It is clear from the legislative history that the purpose of the Act is to insure effective representation for those charged with a crime or confronted with the risk of being deprived of constitutional rights in ancillary proceedings. H.R. REP. NO. 91-1546, 91st Cong. 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3983; CONG. REC. 13728 (1970).

However, it is also clear that Congress did not intend to provide full compensation and that it contemplated appointments of private counsel to supplement the efforts of professional defender organizations. 116 Cong. Rec. 13731 (1970). Thus, although the increased maximum rates envisioned greater participation by the private bar, the Act also presupposes recognition by private attorneys of their professional obligation to render services for those unable to pay. The Criminal Justice Act is in no way an attorney's full-employment act. Congress merely intended that those attorneys who devote themselves to the time-honored tradition of service should not go entirely without compensation.

The history of the American bar is replete with instances of pro bono service by its members. That service has not been undertaken with regard to monetary enrichment, but has been motivated by the higher objective of

obtaining equal justice for all, a goal which enriches and strengthens the commonweal. If our holding today discourages those who look upon the Criminal Justice Act as a profit center, so be it. We have not yet reached the day when other members of the bar will not step forward to take their place, dedicated to the principles of equal justice and competent representation for the less fortunate in our society. *See* ABA Canons of Professional Ethics, Ethical Considerations No. 2-25. *See also United States v. Thompson*, 361 F. Supp. 879, 887 (D. D.C. 1973), *vacated in part, aff'd in part without opinion*, 489 F. 2d 1273 (D.C. Cir. 1974).

Because we conclude that a determination by a district court disallowing fees in excess of the maximum limit under the Criminal Justice Act is not a reviewable order, there is no jurisdiction to entertain these appeals. Therefore, the appeals are dismissed.

A true Copy:

Teste:

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Opinion by District Judge Crowley

United States Court of Appeals 13

For the Seventh Circuit

Chicago, Illinois 60604

October 6, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN POWERS CROWLEY, District Judge*

Nos. 79-2160, 79-2161 and 79-2244 UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JAMES F. SMITH, Defendant. Appeal Of: MARK ROGERS.	Appeals from the United States District Court for the Eastern District of Wisconsin No. 78-CR-157 Myron L. Gordon, JUDGE No. 78-CR-158 Robert W. Warren, JUDGE
No. 79-2068 UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JEAN GRISTEAU, Defendant. Appeal Of: THOMAS E. BUSH, Attorney.	Appeal from the United States District Court for the Eastern District of Wisconsin No. 78-CR-161 Robert W. Warren, JUDGE
No. 80-1054 CHARLES EDWARD BUNN, Petitioner, vs. ATTORNEY GENERAL OF THE UNITED STATES, et al., Respondents. Appeal Of: JONA GOLDSCHMIDT, Attorney.	Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division No. 75-C-3064 James L. Foreman, JUDGE

These causes came before the Court for decision on the record from the United States District Courts for the Eastern District of Wisconsin and the Southern District of Illinois, East St. Louis Division, and were argued by counsel.

*The Honorable John Powers Crowley, Northern District of Illinois, is sitting by designation.

On consideration whereof, it is ordered and adjudged by this Court that these appeals are hereby, DISMISSED, in accordance with the opinion of this court filed this date.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 28, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN POWERS CROWLEY, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, Nos. 79-2068, 2160,2161, vs. & 2244 JAMES F. SMITH (Appeal of Mark Rogers) JEAN GRISTEAU (Appeal of Thomas E. Bush) Defendants-Appellants.	Appeals from the United States District Court for the Eastern District of Wisconsin. Nos. 78-CR-157, 158, 161 Myron L. Gordon and Robert W. Warren, Judges.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by attorney-appellants, Mark Rogers and Thomas E. Bush, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable John Powers Crowley, District Judge of the Northern District of Illinois, is sitting by designation.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 7, 1980

By the Court:

UNITED STATES OF AMERICA, Plaintiff-Appellee, Nos. 79-2068, 79-2160 ya. 79-2161 & 79-2244 JAMES F. SMITH, (Appeal of Mark Rogers) JEAN GRISTEAU (Appeal of Thomas E. Bush) Defendants-Appellants.	Appeals from the United States District Court for the Eastern District of Wisconsin. Nos. 78-Cr-157, 78-Cr-158, and 78-Cr-161. Judge Myron L. Gordon and Judge Robert W. Warren

IT IS ORDERED, by the court, sua sponte, that the order of this court issued on October 28, 1980, denying the petition for rehearing and suggestion for rehearing en banc, is hereby VACATED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 23 __, 1980 .

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN POWERS CROWLEY, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, Nos 79-2068,2160,2161, vs. & 2244 JAMES F. SMITH (Appeal of Mark Rogers) JEAN GRISTEAU (Appeal of Thomas E. Bush) Defendants-Appellants.	Appeals from the United States District Court for the Eastern District of Wisconsin. Nos. 78-CR-157, 158, 161 Myron L. Gordon and Robert W. Warren, Judges

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by attorney-appellants, Mark Rogers and Thomas E. Bush, and the answer to said petition, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable John Powers Crowley, District Judge of the Northern District of Illinois, is sitting by designation.

U.S. Dist. Court E. Wis.
RUTH W. [illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

OCT 4 1979

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 78-CR-158

JAMES F. SMITH,

Defendant.

ORDER

The defendant's counsel has moved for reconsideration of the Court's denial of his request for excess compensation in the above-entitled case. On September 24, 1979, before the Court could rule on counsel's motion, counsel filed a notice of appeal. Apparently defendant's counsel, Mr. Rogers, in order to aid in the appeal, wants the Court to give its reason for denying the excess compensation.

The applicable statute, 18 U.S.C. § 3006A(d)(3), permits the Court to award excess compensation over the $1,000.00 maximum if the representation is "extended or complex" or if the compensation is "necessary" to provide fair compensation within the meaning of the statute. The representation by Attorney Mark J. Rogers was not sufficiently "extended or complex" to warrant an award of fees in excess of the maximum. Furthermore, granting excess compensation in excess of $1,000.00 is not "necessary" to provide fair compensation.

Therefore, it is hereby ordered that the application of Mark J. Rogers for compensation in excess of the maximum allowed by 18 U.S.C. § 3006A(d)(2) is denied.

SO ORDERED this 4th day of October, 1979, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

R. App. 65

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 78-CR-157

JAMES F. SMITH,

Defendant.

O R D E R

The defendant's counsel has moved for reconsideration of my denial of his request for excess compensation in the above-entitled case. Such denial was contained in a letter written by me to Mr. Rogers on July 26.

In such letter, I advised Mr. Rogers that I intended to authorize compensation for his services in the amount of $1000.00, notwithstanding his request for a substantially larger amount. I stated at that time that Mr. Rogers' efforts "roughly equalled those which would have been required to try a non-complex matter." I remain persuaded that such conclusion was correct. Also, I find that granting additional fees was not necessary to provide fair compensation to counsel. Accordingly, his present motion will not be granted.

Therefore, IT IS ORDERED that counsel's motion for reconsideration of the denial of excess compensation be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 24th day of September, 1979.

U. S. District Judge

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R. App. 62

United States District Court

Eastern District of Wisconsin

Chambers of
Judge Robert W. Warren

July 24, 1979

Federal Building
Milwaukee, Wisconsin 53202

Mr. Thomas E. Bush
Attorney at Law
161 W. Wisconsin Ave.
Milwaukee, WI 53203

Re: United States v. Gristeau
Case No. 78-CR-161

Dear Mr. Bush:

I have read and considered your letter (and attachment) of June 13 relative to your fees as appointed counsel in the above case. I have also discussed with Judge Gordon the fee situation in United States v. Smith wherein the jurisdictional issues were presented.

While I am sympathetic to your presentation, I am also mindful of the fact that the Federal Courts do not attempt to meet the prevailing hourly rates and that representation of indigent defendants in Federal Courts is oft times quite close to pro bono work.

I have forwarded your voucher for payment in the sum of $1,000.00.

Very truly yours,

Robert W. Warren

ROBERT W. WARREN,
U.S. District Judge

RWW/msb

A-19

United States District Court

Eastern District of Wisconsin

Chambers of
Judge Myron L. Gordon
Milwaukee

Federal Building
Milwaukee, Wisconsin 53202

July 26, 1979

Mark J. Rogers
Angermeier & Rogers
161 W. Wisconsin Ave.
Milwaukee, Wisconsin 53203

Re: United States v. Smith
Nos. 78-CR-157 and 78-CR-158

Dear Mr. Rogers:

This letter is in regard to your request for attorney's fees in the above-entitled cases. Judge Warren and I have met and discussed the matter of your compensation, and we believe that $2000 is appropriate compensation for your representation of Mr. Smith. Accordingly, I have authorized payment of $1000 plus $286.16 for your compensation and itemized expenses in case no. 78-CR-157. I understand that Judge Warren will also approve a fee of $1000 in case no. 78-CR-158.

You should not regard our decision to grant you less compensation than requested as any indication of our dissatisfaction with your professional services. We believe you diligently and ably represented your client in these cases. However, Congress has set a maximum amount of $1000 for compensation in felony cases, including those which go to trial. While you spent a large amount of time on the pretrial motions, the cases did not go to trial. We believe that your efforts in these cases roughly equalled those which would have been required to try a non-complex matter. We have, therefore, granted you the amount of compensation which Congress has set as a maximum for such cases.

Very truly yours,

Myron L. Gordon

MLG:ar
cc: Honorable Robert W. Warren

R. App. 59

United States District Court

Eastern District of Wisconsin

Chambers of
Judge Robert W. Warren

July 30, 1979

Federal Building
Milwaukee, Wisconsin 53202

Mr. Mark J. Rogers
Angermeier & Rogers
161 W. Wisconsin Ave.
Milwaukee, WI 53203

Re: United States v. Smith
Case Nos. 78-CR-157 & 78-CR-158

Dear Mr. Rogers:

As Judge Gordon explained in his letter of July 26, he and I discussed the vouchers which you submitted in the above two cases.

I have likewise authorized $1,000 plus your itemized expenses of $243.37 in case 78-CR-158.

You can be proud of the fine research which you performed on behalf of Mr. Smith. It is unfortunate that the strictures of the system do not permit us to compensate you at a full market level.

Very truly yours,

Robert W. Warren

ROBERT W. WARREN,
U.S. District Judge

RWW/msb
cc. Honorable Myron L. Gordon

R. App. 61

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

November 7, 1980

Mr. Jerold S. Solovy
Jenner & Block
One IBM Plaza
44th Floor
Chicago, IL 60611

In re: UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JAMES F. SMITH, (Appeal of Mark Rogers) JEAN GRISTEAU (Appeal of Thomas E. Bush), Defendants-Appellants. Nos. 79-2068, 79-2160, 79-2161 and 79-2244.

Dear Mr. Solovy:

The court has directed the clerk of the court to notify counsel for the plaintiff-appellee in the above entitled appeal to file an asnwer to the defendants-appellants' petitioner for rehearing and suggestion for rehearing en banc on or before November 17, 1980. Twenty-five (25) copies of that answer will be required.

Sincerely yours,

Thomas F. Strubbe (dbg mm)

Thomas F. Strubbe

TFS/mm

cc: Mr. Mark J. Rogers
Mr. William R. Burchill
Mr. Meryl Silverman

No. 80-1416

APR 7

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARK J. ROGERS and THOMAS E. BUSH,

Petitioners,

vs.

MYRON L. GORDON, UNITED STATES DISTRICT JUDGE, and ROBERT W. WARREN, UNITED STATES DISTRICT JUDGE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1416

MARK J. ROGERS and THOMAS E. BUSH,

Petitioners,

VS.

MYRON L. GORDON, UNITED STATES DISTRICT JUDGE, and ROBERT W. WARREN, UNITED STATES DISTRICT JUDGE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Mr. Rogers' Representation and Fee Requests

Respondent, Judge Myron L. Gordon, appointed petitioner Rogers to represent defendant James Smith, a Menominee Indian, in 78-Cr-157, in which Smith was charged with robbery, false personation, unlawful possession of a firearm, escape, and assaulting an officer of the

Bureau of Indian Affairs. Respondent, Judge Robert W. Warren, appointed Mr. Rogers to represent Smith in a separate case, 78-Cr-158, in which Smith was charged with assaulting a federal officer and theft of property belonging to an Indian tribe.

At least half of the time for which Mr. Rogers sought reimbursement in these two cases was devoted to a Motion to Dismiss the Indictment or to Stay Proceedings, which he filed in both cases. The cases were temporarily consolidated for a decision on this motion, which alleged discrimination against Indians in the selection of grand and petit jurors. Judge Gordon denied the motion in its entirety, ruling that defendants had failed to make a prima facie showing of discrimination. Thereafter, Smith entered into a plea agreement which disposed of the charges in both cases.

Mr. Rogers subsequently requested Judges Gordon and Warren to compensate him for his services in these two cases under the Criminal Justice Act, 18 U.S.C. § 3006A, in an amount in excess of $6,200, plus expenses. Both Judges held that the representation rendered by Mr. Rogers in the cases before them was neither extended nor complex within the meaning of section 3006A(d)(3). Therefore, each Judge approved compensation of $1,000, the statutory maximum, plus expenses.[1]

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[1] Section 3006A(d)(1) provides that attorneys appointed pursuant to the Criminal Justice Act "shall . . . be compensated. . . ." Section 3006A(d)(2) provides that this compensation "shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged. . . ." Section 3006A(d)(3) provides for payment in excess of this amount "for extended or complex representation whenever the court in which the representation was rendered . . . certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Circuit."

Mr. Bush's Representation and Fee Request

Judge Warren appointed petitioner Bush to represent Jean Gristeau, a Menominee Indian, in 78-Cr-161, in which Gristeau was charged with assault and theft. In the course of his representation of Gristeau, Mr. Bush filed a shorter version of Mr. Rogers' motion challenging the jury selection procedures. Gristeau's case was consolidated with Smith's cases before Judge Gordon for hearing on these motions. As noted above, these motions were denied. Thereafter, Gristeau was tried before Judge Warren sitting with a jury. The jury convicted Gristeau of the theft charge after a trial lasting less than two full trial days.

Mr. Bush subsequently requested compensation for his services in an amount in excess of $2,800, plus expenses. Judge Warren held that the representation rendered by Mr. Bush was neither extended nor complex, and therefore awarded Mr. Bush $1,000.

Petitioners' Appeals to the Seventh Circuit

Messrs. Rogers and Bush prosecuted appeals before the Seventh Circuit, contending that Judges Gordon and Warren had erred in refusing to award them fees in excess of the statutory maximum for their services. Both petitioners asserted that the fee awards constituted "final decisions," which the Seventh Circuit had jurisdiction to review under 28 U.S.C. § 1291. Respondents disputed the Seventh Circuit's jurisdiction to hear the appeals. The Seventh Circuit dismissed the appeals for want of jurisdiction, ruling that the refusal to award attorneys' fees in excess of the statutory maximum was not a reviewable order. *United States* v. *Smith*, 633 F.2d 739 (7th Cir. 1980) (R. App. Ex. 1)[2].

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[2] Respondents have submitted a separately bound Appendix with this brief. R. App. Ex. 1 refers to Respondents' Appendix, Exhibit 1.

SUMMARY OF ARGUMENT

I. The Seventh Circuit carefully analyzed the Criminal Justice Act and correctly concluded that Congress did not intend fee awards to be appealable. This conclusion is buttressed by the fact that the procedure by which fee awards are made involves none of the adversarial indicia of judicial proceedings. Given the fact that a decision holding fee awards under the Criminal Justice Act appealable could result in a flood of new appeals that might swamp the courts of appeals and this Court, the Seventh Circuit correctly refused to infer appellate jurisdiction where Congress had not expressly created it.

The thrust of petitioners' argument is that attorneys are undercompensated for their representation of indigents. Petitioners should present this argument to Congress, not this Court. Congress set the hourly rates and maximum fee amounts in the Act, and only Congress can raise them if they are too low.

II. The cases petitioners cite to show the existence of a conflict do not address the issue whether a district court's decision not to award attorneys' fees in excess of the maximum amount set forth in the Criminal Justice Act is a reviewable order. Consequently, there is no conflict among the circuits on this issue. Moreover, the Seventh Circuit's decision does not conflict in principle with cases addressing other issues arising under the Act. Finally, the fact that other attorneys' fee determinations may be appealable is irrelevant to the appealability of fee determinations under the Criminal Justice Act because the provisions of the Act are unique.

III. The procedure and practice of the lower courts in making and reviewing fee awards under the Act are not varied and chaotic. The cases petitioners cite to demon-

strate chaos in the lower courts in fact demonstrate a uniform practice and procedure. There is, therefore, no need for this Court to intervene and set forth guidelines for making and reviewing fee determinations.

IV. The question whether mandamus is an appropriate vehicle for the review of fee awards is not presented in this case because petitioners did not seek a writ of mandamus below. Furthermore, this question is irrelevant to the issue whether an attorney may appeal a fee determination, which depends entirely upon whether Congress intended to make these determinations reviewable. Similarly, this case presents no issue as to the Sixth Amendment rights of indigent defendants because the indigent defendants represented by petitioners received competent assistance of counsel below.

ARGUMENT

I.

THE DECISION OF THE SEVENTH CIRCUIT IS CORRECT AND DOES NOT PRESENT IMPORTANT ISSUES WORTHY OF REVIEW BY THIS COURT.

Congress has provided for the compensation of court-appointed counsel in the Criminal Justice Act, 18 U.S.C. § 3006A(d). Section 3006A(d)(1) authorizes the district courts to compensate appointed counsel "at a rate not exceeding $30 per hour for time expended in court . . . and $20 per hour for time reasonably expended out of court. . . ." In section 3006A(d)(2), Congress has imposed a maximum on the amount of fees the district courts may award appointed counsel: the fees awarded an appointed attorney "shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged. . . ." Section 3006A(d)(3) provides that appointed counsel may receive fees in excess of the statutory maximum "for extended or complex representation whenever the court in which the representation was rendered . . . certifies that the amount of the excess payment is necessary to provide fair compensation. . . ." Section 3006A(d)(3) further conditions payment of fees in excess of the statutory maximum upon approval of the district court's certification by the Chief Judge of the Circuit. Apart from the Chief Judge's approval of excess compensation, the Criminal Justice Act contains no provision for review of fee awards. Similarly, the legislative history of the Act contains nothing indicating that Congress intended fee awards thereunder to be reviewable.

As this Court has held, there is no right to an appeal unless bestowed by statute. *McKane* v. *Durston*, 153 U.S. 684 (1894); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Appellants bear the burden of demonstrating the existence of "that clear statutory mandate" necessary to establish jurisdiction for an appeal. *Curlott* v. *Campbell*, 598 F.2d 1175, 1178 (9th Cir. 1979). The nature of the proceedings below and of the Criminal Justice Act renders fruitless any attempt to establish such a mandate for appeal of district courts' fee awards pursuant to the Act.

Compensation was requested and awarded below in a manner that typifies the procedure under the Criminal Justice Act. After the criminal cases had been resolved in the district courts, and petitioners' services in those courts concluded, petitioners submitted their requests for fees on standardized voucher forms provided for that purpose, without serving copies on opposing counsel. Neither petitioner requested or received a hearing on this matter, and no opposing attorney made, or was given the opportunity to make, any presentation or objections. Both judges responded to the voucher requests by letters not entered on the docket sheets or sent to any other party. None of the indicia of a judicial dispute was present: there was no adverse party, no contested issue, no hearing, and no order was entered compelling the payment of funds by a party before the court.

The structure of the Criminal Justice Act itself underscores the radical differences between the fee determinations and judicial proceedings that are subject to appeal. That no appellate review was contemplated by the drafters of the Act is clear from the complexities that would result from imposing appellate review on the statutory scheme, which calls for approval by the Chief Judge of the Circuit of fees in excess of the statutory maximum. 18 U.S.C. § 3006A(d)(3). For example, had the Seventh Circuit

granted petitioners' requests to remand with directions to certify for excess compensation, the case would return only briefly to the district court before being forwarded to the Chief Judge of the Circuit for approval of the certification that had been ordered by the appellate court. The Chief Judge of the Circuit then would have to review, and possibly disagree with, the decision made by a panel of his own court.

If fee awards were reviewable, a question would arise as to whether the government could appeal a district court's award of excess compensation and what its path to appeal would be. If the government appeals before the Chief Judge reviews the certification, the appeal would create needless duplication and would render the Chief Judge's role frivolous unless the Chief Judge sought to overrule the panel. If the government appeals after the Chief Judge ruled, then a panel of the court would sit in review of its Chief Judge. Even this brief review of the Act highlights the fact that Congress never intended to authorize appellate review of fee awards smaller than the statutory maximum.

The Seventh Circuit carefully studied the Criminal Justice Act. The court stated that the "statutory scheme clearly requires that appropriate awards of compensation are left to the discretion of the court which has had the opportunity to view the proceedings first hand." 633 F.2d at 740. This, coupled with the fact that the Act expressly required review of fee awards in excess of the maximum by the Chief Judge of the Circuit but provided no review for any other fee awards, caused the Seventh Circuit to conclude: "It is, then, the district court which makes the ultimate decision as to the appropriate amount of compensation made within the maximum limit, and any review of the award is confined to that court." 633 F.2d at 741.

The Seventh Circuit also rejected petitioners' efforts to characterize the fee awards as "final decisions" appealable under 28 U.S.C. § 1291. The court described the procedure for awarding fees, which it correctly characterized as "non-adversarial." 633 F.2d at 741. Citing *Brooks* v. *Laws*, 208 F.2d 18 (D.C. Cir. 1953) (non-admission to district court bar not appealable), *Application of L.B. & W. 4217*, 238 F.2d 163 (9th Cir. 1956) (lack of adverse party emphasized in conclusion that licensing determination was not appealable judicial decision), and *In re Jacobi*, 217 F.2d 668 (D.C. Cir. 1954) (lack of hearing emphasized in conclusion that bar admission was not an appealable judicial decision), the court stated that the absence of any "indicia accompanying an adversary proceeding" buttressed its conclusion that fee awards are not appealable judicial decisions.[3]

---

[3] Petitioners attack this portion of the Seventh Circuit's decision by citing cases in which other "non-adversarial" determinations are reviewed on appeal: *Roberts* v. *United States District Court for the Northern District of California*, 339 U.S. 844 (1950) (denial of motion to proceed in forma pauperis); *United States* v. *Davis*, 604 F.2d 474 (7th Cir. 1979) (refusal to appoint a specific attorney); *United States* v. *Deutsch*, 599 F.2d 46 (5th Cir.), *cert. denied*, 444 U.S. 935 (1979) (refusal to appoint any attorney based on a determination that the defendant was not indigent). Petition at 30-32. In each of these cases the determination reviewed, though arguably "non-adversarial" in the first instance, directly implicated the constitutional rights of the appellant in the trial proceedings. Consequently, the courts allowed the appellants to prosecute appeals from these determinations. In contrast, as the courts in *Camenisch* v. *United States*, 553 F.2d 1271 (D.C. Cir. 1976), and *Thompson* v. *District of Columbia*, 407 A.2d 678 (D.C. Ct. App. 1979), have held, awarding payment to an attorney on a compensation claim under the Act does not implicate the attorney's Fifth Amendment due process rights or contract rights. Nor does an attorney's fee award implicate the Sixth Amendment rights of the defendant the attorney represents. See pp. 21-22, *infra*.

The Seventh Circuit's refusal to infer appellate jurisdiction where Congress has not expressly created it is particularly appropriate in light of the crushing impact appellate jurisdiction over fee awards would have on the federal courts. During fiscal 1977 alone, the district courts made fee awards under the Act in 21,414 cases.[4] A ruling that fee awards are reviewable on appeal would open the door to a potential flood of appeals that could swamp the already burdened dockets of the courts of appeals.[5]

Petitioners exaggerate the significance of the Seventh Circuit's decision. Petitioners' basis for contending that this case is important is their argument that the present fee rates and maximum fee amounts set by the Criminal Justice Act are too low to guarantee that competent lawyers will undertake to defend indigent defendants. Yet petitioners never explain how an attorney's right to appeal will raise fee awards in the absence of a statutory amendment increasing the Act's hourly rates and maximum fee schedule. Rather, petitioners rely on the dubious assumption that courts of appeals are likely to reverse the discretionary fee awards made by the district courts that observed the representation for which compensation is sought.

Petitioners present their complaints that the Criminal Justice Act's "ridiculously low maximum statutory

---

[4] See Exhibit C-1 to Annual Report of Director of the Administrative Office of the United States Courts 1978, submitted to the Seventh Circuit by petitioner Rogers on March 5, 1980 pursuant to the Rule 28(j) of the Federal Rules of Appellate Procedure. (R. App. Ex. 2).

[5] A holding that fee awards are appealable also would have a severe impact on this Court's burgeoning docket. In fiscal 1977, the courts of appeals made fee awards for services rendered on appeal in 1,573 cases. *Id.*

amounts," Petition at 35, result in "gross undercompensation," Petition at 50, to the wrong branch of the federal government. As this Court recently noted, problems with the Criminal Justice Act and the representation of indigent defendants that might be "remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis of empirical data." *Ferri* v. *Ackerman*, 444 U.S. 193, 205 (1979). Congress, not the courts, has set the fee rates and the maximum fee amounts in the Criminal Justice Act, and only Congress can change them.[6]

Petitioners have attempted to present this Court with problems that do not exist.[7] Respondents agree wholeheartedly with the Seventh Circuit's opinion:

> The history of the American bar is replete with instances of pro bono service by its members. That service has not been undertaken with regard to monetary enrichment, but has been motivated by the higher objective of obtaining equal justice for all, a goal which enriches and strengthen the commonweal. If our holding today discourages those who look upon the Criminal Justice Act as a profit center, so be it. We have not yet reached the day when other members of the

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[6] The 95th Congress considered, but did not enact, legislation which would have increased both hourly rates and statutory maximums by fifty percent. S.1437 and H.R. 6869. See Annual Report of Director of the Administrative Office of the United States Courts 1978, at 562, submitted to the Seventh Circuit by petitioner Rogers on March 5, 1980, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. (R. App. Ex. 2)

[7] Petitioners argue that appointed attorneys may defer to "the desires of the court" rather than represent the interests of their indigent clients zealously because they receive their compensation from the court. Petition at 52-54. Respondents observe members of the bar practice on a daily basis and can assure this Court that the bar has not reached such a sorry state.

> bar will not step forward to take their place, dedicated to the principles of equal justice and competent representation for the less fortunate in our society.

633 F.2d at 741.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

A. The Seventh Circuit Is The First Court To Address The Appealability Of A District Court's Determination That Appointed Counsel Is Not Entitled To Fees In Excess Of The Maximum Set Forth In The Criminal Justice Act.

Petitioners urge, in support of their petition for a writ of certiorari, the purported existence of a conflict among the circuits on whether a court-appointed attorney can appeal a district court's refusal to award fees in excess of the limit set by the Criminal Justice Act, 18 U.S.C. § 3006A(d). Petition at 20.

In fact, no such conflict exists; the Seventh Circuit is the first court to address this issue. Indeed, only one other court of appeals has even mentioned this issue. In *United States* v. *Sullivan*, 456 F.2d 1273 (5th Cir. 1972), court-appointed counsel attempted to appeal the district judge's denial of his request for fees in excess of the statutory maximum in the context of his client's appeal from a conviction. The Fifth Circuit refused to address the question of attorneys' fees in that context: "This appeal does not provide a forum for his appointed attorney's personal financial complaints." 456 F.2d at 1275. Rather than directing counsel to file his own appeal for review of fees, the Fifth Circuit cast considerable doubt on the appealabil-

ity of fee determinations altogether, stating that it declined to "decide whether a trial judge's decision on compensation under this Act is appealable at all." 456 F.2d 1275. See also *United States* v. *Todd*, 475 F.2d 757, 759 n.3 (5th Cir. 1973).

B. The Three Cases Petitioners Cite As Conflicting Do Not Consider The Issue Resolved Below, And Do Not Even Suggest That The Fourth, Eighth, And Ninth Circuits Would Adopt A Rule Of Law Contrary To That Set Forth Below.

Of the three cases on which petitioners rely to demonstrate the existence of a conflict among the circuits,[8] only *United States* v. *Turner*, 584 F.2d 1389 (8th Cir. 1978) (per curiam) is an appeal from a district court's refusal to award fees in excess of the statutory maximum. Although petitioners state that the *Turner* court "assumed jurisdiction," Petition at 21, the court in fact overlooked the jurisdictional issue. The parties neglected to bring the jurisdictional question to the court's attention in their briefs (R. App. Ex. 3), and the court's two paragraph per curiam affirmance of the fee award does not mention the issue of appellate jurisdiction. As this Court has recognized, such *sub silentio* decisions, in which a court never really focuses on an issue, are of limited precedential value concerning that issue. See *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). There is no reason to believe that the Eighth Circuit, if it addressed the question of appealability, would reach a conclusion in conflict with that set forth in the Seventh Circuit's careful opinion below.

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[8] *United States* v. *Turner*, 584 F.2d 1389 (8th Cir. 1978) (per curiam); *United States* v. *Ketchum*, 420 F.2d 901 (4th Cir. 1969); *Botts* v. *United States*, 413 F.2d 41 (9th Cir. 1969).

In *United States* v. *Ketchum*, 420 F.2d 901 (4th Cir. 1969), the district court refused to reimburse court-appointed counsel for expenses "necessarily incurred" in representing his client, 420 F.2d at 904, despite the clear directive of section 3006A(d)(1) that an "attorney shall be reimbursed for expenses reasonably incurred. . . ." The attorney did not appeal this refusal, but mentioned it at the oral argument of the appeal of his client's conviction. The Fourth Circuit, which reversed and remanded the conviction, directed the district court to order reimbursement on remand. 420 F.2d at 904. *Ketchum* is hardly an example of appellate review of a district court's discretionary determination under the Criminal Justice Act that an attorney is entitled to less money than he requested. Moreover, as in *Turner*, the jurisdictional issue resolved below was neither presented by the parties to, nor addressed by, the *Ketchum* court. *Ketchum* does not demonstrate a conflict between the law of the Fourth and Seventh Circuits.

Botts v. *United States*, 413 F.2d 41 (9th Cir. 1969), does not involve the assertion of appellate jurisdiction, even *sub silentio*, over a district court's determination that a court-appointed attorney was not entitled to an award in excess of the statutory maximum. In *Botts*, an appointed attorney who had received no compensation for his services filed suit against the United States under a provision of the Tucker Act, 28 U.S.C. § 1346(a)(2), to recover his compensation. The district court granted the government's motion for summary judgment based upon an affidavit of the Clerk of the District Court stating that the attorney had not submitted the required voucher forms. The Ninth Circuit reversed the decision, holding that the attorney's counter-affidavit stating that he had filed the voucher created a genuine issue of material fact, but instructed the district court to allow the attorney to submit

a new voucher and to compensate him based on the new voucher. *Botts* required the Ninth Circuit to review only a grant of summary judgment that did not present any question as to the propriety of a district court's determination of the amount of fees appointed counsel was to receive. *Botts* provides no basis for assuming that the Ninth Circuit would not follow the opinion of the Seventh Circuit were it asked to review the denial of a request for excess fees under the Criminal Justice Act.

C. The Decision Below Does Not Conflict "In Principle" With Other Cases In Which Courts Of Appeals Have Reviewed Issues Arising Under The Criminal Justice Act.

In addition to asserting the existence of a direct conflict between the opinion below and the decisional authority of other courts of appeals, petitioners contend that the opinion below conflicts in principle with the assertion of appellate jurisdiction over other cases dealing with issues under the Criminal Justice Act. Petition at 24-25. In support of this proposition, petitioners cite *United States* v. *Reddick*, 620 F.2d 606 (7th Cir. 1980), *United States* v. *Sims*, 617 F.2d 1371 (9th Cir. 1980), *United States* v. *Rogalsky*, 575 F.2d 457 (3d Cir. 1978), and *United States* v. *Crim*, 527 F.2d 289 (10th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976).

These cases are wholly inapposite. *Reddick*, *Sims*, and *Crim* are appeals of convicted defendants claiming that they were deprived of their constitutional rights to a fair trial as a result the trial court's refusal to allow funds for expert or investigative services pursuant to section 3006A(e). In *Rogalsky*, the government successfully challenged the authority of the district court under 18 U.S.C. § 4244 to require the Department of Justice to pay the bills

of psychiatrists retained by the Federal Defender for use in preparing and presenting the defense. These cases do not indicate, even inferentially, that an appellate court has jurisdiction over an attorney's appeal of a district court's refusal to compensate him in excess of the statutory maximum.[9]

D. Cases Cited By Petitioners To Demonstrate The Appealability Of Attorneys' Fee Determinations In Other Contexts Are Inapposite To The Case At Bar And Demonstrate No Conflict In The Decisional Authority.

Petitioners further argue that the opinion below conflicts with decisional authority allowing appellate review of attorneys' fee determinations in other contexts. Petition at 27-30. Yet the very first case petitioners cite in this regard, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), wholly undercuts this assertion. In *Alyeska*, this Court emphatically stated that parties and courts may not reason by analogy among statutory allowances of attorneys' fees because they "differ considerably among themselves." 421 U.S. at 260-61. This Court further

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[9] Indeed, *Crim* inferentially supports the opinion below. In *Crim*, the district court authorized payment of the maximum amount of investigative funds allowable under section 3006A(e), but refused to approve funds in excess of that amount. On the appeal of his conviction, the defendant challenged this refusal. The Tenth Circuit ruled: "We cannot reverse a trial court for refusing to authorize the expenditure of investigative funds in excess of the limits prescribed by Congress." 527 F.2d at 296. The court did not discuss its lack of power in jurisdictional terms because the appellant was the convicted defendant. Had the appellant been the investigator seeking more money for his services, however, as the appellants below were the attorneys, the court's lack of power would have amounted to a lack of jurisdiction to hear the investigator's appeal.

highlighted the uniqueness of the Act's attorneys' fees provision by omitting it from an exhaustive compilation of approximately thirty federal statutes allowing awards of attorneys' fees. 421 U.S. at 260 n.33.

The Criminal Justice Act's attorneys' fees provision truly is unique. No other attorneys' fees statute provides a maximum fee allowance and requires the Chief Judge of the Circuit to approve awards in excess of that maximum. Other attorneys' fees statutes, and the cases interpreting them, are therefore irrelevant to the construction of the Criminal Justice Act. The court below was thus correct in following this Court's mandate in *Alyeska* to avoid reasoning by analogy to these provisions.

Similarly, petitioners' argument that the opinion below conflicts with cases in which appellate courts have reviewed determinations of other litigation fees, such as the fee paid a special master, is not persuasive. Petition at 25-27. None of the cases cited by petitioners involve awards of fees subject to the statutory scheme present in the Criminal Justice Act. Consequently, these cases do not supply any reason to presume that fee determinations made pursuant to the Act are reviewable.

III.

THE PROCEDURE AND PRACTICE OF THE LOWER COURTS IN MAKING AND REVIEWING FEE AWARDS ARE NOT CHAOTIC AND THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

Petitioners argue that the procedures followed by the lower courts in making and reviewing awards of fees to appointed counsel are so varied as to be "chaotic." Petition at 34. The careful examination of the cases petitioners

cite in support of this proposition that follows, however, reveals that this chaos is as illusory as the purported conflict between the circuits.

As the primary example of varied practice, petitioners compare *United States* v. *D'Andrea*, 612 F.2d 1386 (7th Cir. 1980), with *United States* v. *Thompson*, 361 F. Supp. 879 (D.D.C. 1973). In *D'Andrea*, the Seventh Circuit held that an attorney could not seek review by the appellate court of the approval by the Chief Judge of Circuit of a fee award smaller than that requested for services rendered before the court of appeals. According to the court, the attorney's remedy, if any, lies in a mandamus action before this Court. Petitioner asserts that in *United States* v. *Boggins*, 489 F.2d 1273 (D.C. Cir. 1974) (unpublished), the Court of Appeals for the District of Columbia reviewed Chief Judge Bazelon's approval in *Thompson* of excess fees awarded by a district court, thus following a procedure different from that described in *D'Andrea*. Petition at 36-37. This assertion is erroneous. As the appended Judgment and Memorandum in *Boggins* show, the D.C. Circuit reviewed only the validity of the defendant's convictions in that case, and not the fee award received by his counsel. (R. App. Ex. 4.) Thus *D'Andrea* and *Thompson/Boggins* do not indicate that the procedure for reviewing fee determinations differs among the circuits.

Similarly, petitioners assert that in *United States* v. *Kingston*, 256 F. Supp. 859 (W.D. Pa. 1966), the Chief Judge of the Third Circuit reviewed a district court's determination not to award compensation in excess of the statutory maximum, despite the fact that the Criminal Justice Act does not authorize such review. Petition at 37. Again, petitioners are mistaken. The district court in *Kingston* had awarded counsel a total fee of $2,055, far

in excess of the then-maximum fee in felony cases of $500.[10] See 256 F. Supp. at 860. Consequently, the Chief Judge was following the letter of the Act in reviewing this fee award. Not surprisingly, petitioners have not cited any case in which a chief judge supposedly has reviewed a district court's determination not to award fees in excess of the statutory maximum.[11]

IV.

THIS CASE DOES NOT WARRANT REVIEW ON WRIT OF CERTIORARI FOR ANY OTHER REASON.

A. The Question Whether Mandamus Is Appropriate As The Sole Remedy For Review Of A District Court's Denial Of Excess Compensation Under The Criminal Justice Act Is Not Presented In This Case.

Petitioners argue at length that mandamus is not an appropriate vehicle for the review of fee awards under the Criminal Justice Act. Petition at 40-47. Yet peti-

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[10] Chief Judge Staley stated that appointed counsel had been compensated for the following number of hours at the then-maximum hourly rates: ". . . 46 hours spent in open court, for which the district judge allowed the maximum rate under the Act of $15 per hour [a total of $690 for time spent in court], and 136½ hours of out-of-court preparation, for which the district judge allowed the statutory maximum rate of $10 per hour [a total of $1365 for out-of-court work]." 256 F. Supp. at 860. Adding the $690 counsel was awarded for court time to the $1,365 for time spent on the case out of court yields a total fee award of $2,055. Chief Judge Staley refused to approve this award and directed the district court to award $500, then the statutory maximum for representation in felony cases. 256 F. Supp. at 861.

[11] The only other cases petitioners cite in their attempt to reveal chaos in the practice and procedure district court fee awards are *Turner*, *Ketchum*, and *Botts*. As discussed above, these cases do not represent any real conflict on this point. See pp. 13-15, *supra*.

tioners have not sought review of their fee awards by writ of mandamus, and the question whether mandamus may be properly used for that purpose was not presented in the appeal below. In fact, the propriety of mandamus for review of fee awards is wholly irrelevant to the question presented by this case: whether Congress, in the Criminal Justice Act, has provided an attorney with the right to appeal a district court's determination that the attorney is not entitled to fees in excess of the statutory maximum under the Act. This Court may not invade the province of the legislature by creating a right to appeal where Congress has not done so. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 271 (1975); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *McKane* v. *Durston*, 153 U.S. 684 (1894).

Because the mandamus issue is irrelevant, respondents will not respond to petitioners' characterization of the availability of that writ in detail. Nevertheless, petitioners have overstated the restrictions on the issuance of a writ of mandamus, and a brief response to this overstatement is necessary. The Criminal Justice Act speaks in mandatory terms in directing the compensation and reimbursement of appointed counsel. *United States ex rel. Bibbs* v. *Twomey*, 538 F.2d 151, 154 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). Consequently, even under the most rigorous standards cited by petitioners, appointed counsel may obtain relief by writ of mandamus where a district court has refused to award any compensation or reimbursement. Moreover, despite petitioners' protestations to the contrary, the courts of appeals do have the power to issue the writ of mandamus to correct gross abuses of discretion. *E.g.*, *Investment Properties International, Ltd.* v. *IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972) (mandamus lies to direct district judge to vacate order restricting discov-

ery); *Dairy Industries Supply Ass'n* v. *LaBuy,* 207 F.2d 554 (7th Cir. 1953) (mandamus lies to direct district judge to reconsider motion to transfer pursuant to 28 U.S.C. § 1404(a) on the basis of proper factors as set forth in the court's opinion). See *United States* v. *D'Andrea,* 612 F.2d 1386, 1388 (7th Cir. 1980) (review of chief judge's approval of fee award lies in a mandamus action in this Court).

The primary objection to use of the extraordinary writs, including mandamus, for the review of fee awards is that they have "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy." Petition at 41, quoting *Ex parte Fahey,* 332 U.S. 258, 260 (1947). Yet petitioners' attempt to appeal these fee awards places two district judges as litigants before this Court, and here, as below, respondents are represented by personal counsel. Furthermore, appeal is not an adequate remedy here because Congrss has not authorized appeals of fee awards under the Act.

Respondents recognize, as did the *D'Andrea* court, 612 F.2d at 1388 n.3, that review is much more difficult to obtain by mandamus than by appeal. Given the overwhelming number of fee awards under the Act, if any procedure is to be used to review these awards it should be the more restrictive procedure of mandamus.

B. This Case Does Not Present A Question Concerning The Sixth Amendment Rights Of Defendants.

Section III of the Petition concerns the Sixth Amendment right of indigent defendants to effective assistance of counsel. Petition at 47-55. Before addressing this

issue, it is important to make clear what the Seventh Circuit's decision does *not* do. It in no way affects the right of a defendant to claim on appeal that he has been denied his Sixth Amendment right to effective assistance of counsel for any reason, including the fact that his attorney could not devote sufficient attention to his case for financial reasons.

Petitioners assert: "It is now likely that indigent defendants are being deprived of effective and competent counsel, in violation of their rights under the Sixth Amendment, given the admittedly low rates provided by the CJA, now that appointed counsel are subject to malpractice liability, and now that denials of excess compensation under the CJA cannot be appealed." Petition at 48. But petitioners do not contend that defendants Smith and Gristeau were denied their right to the effective assistance of counsel. Nothing in the records of their cases indicates that these defendants received anything but competent representation from petitioners Rogers and Bush. In fact, Gristeau appealed her conviction to the Seventh Circuit, but made no claim that she had received ineffective assistance of counsel. See *United States* v. *Gristeau*, 611 F.2d 181 (7th Cir. 1979), *cert. denied*, 447 U.S. 907 (1980).

Earlier this year, this Court stated: "We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law." *Upjohn Co.* v. *United States*, 49 U.S.L.W. 4093, 4093 (1981). Throughout its history, "this Court has followed a policy of strict necessity in disposing of constitutional issues." *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947). One corollary of this policy is that "constitutional issues affecting legislation will not be determined . . . at the instance of one who fails to show that he is injured

by the statute's operation. . . ." 331 U.S. at 569. Even assuming that attorneys have standing to assert their clients' Sixth Amendment rights under these circumstances, petitioners' clients have suffered no injury as a result of the Criminal Justice Act. Consequently this Court is not here presented with the Sixth Amendment issue petitioners attempt to raise.

CONCLUSION

For the reasons stated above, respondents Myron L. Gordon and Robert W. Warren, Judges of the United States District Court for the Eastern District of Wisconsin, respectfully request this Court to deny this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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